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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Denied

No. 1049

FEDERAL DEPOSIT INSURANCE CORPORATION,
RECEIVER OF THE PARKSLEY NATIONAL BANK,
Petitioner,

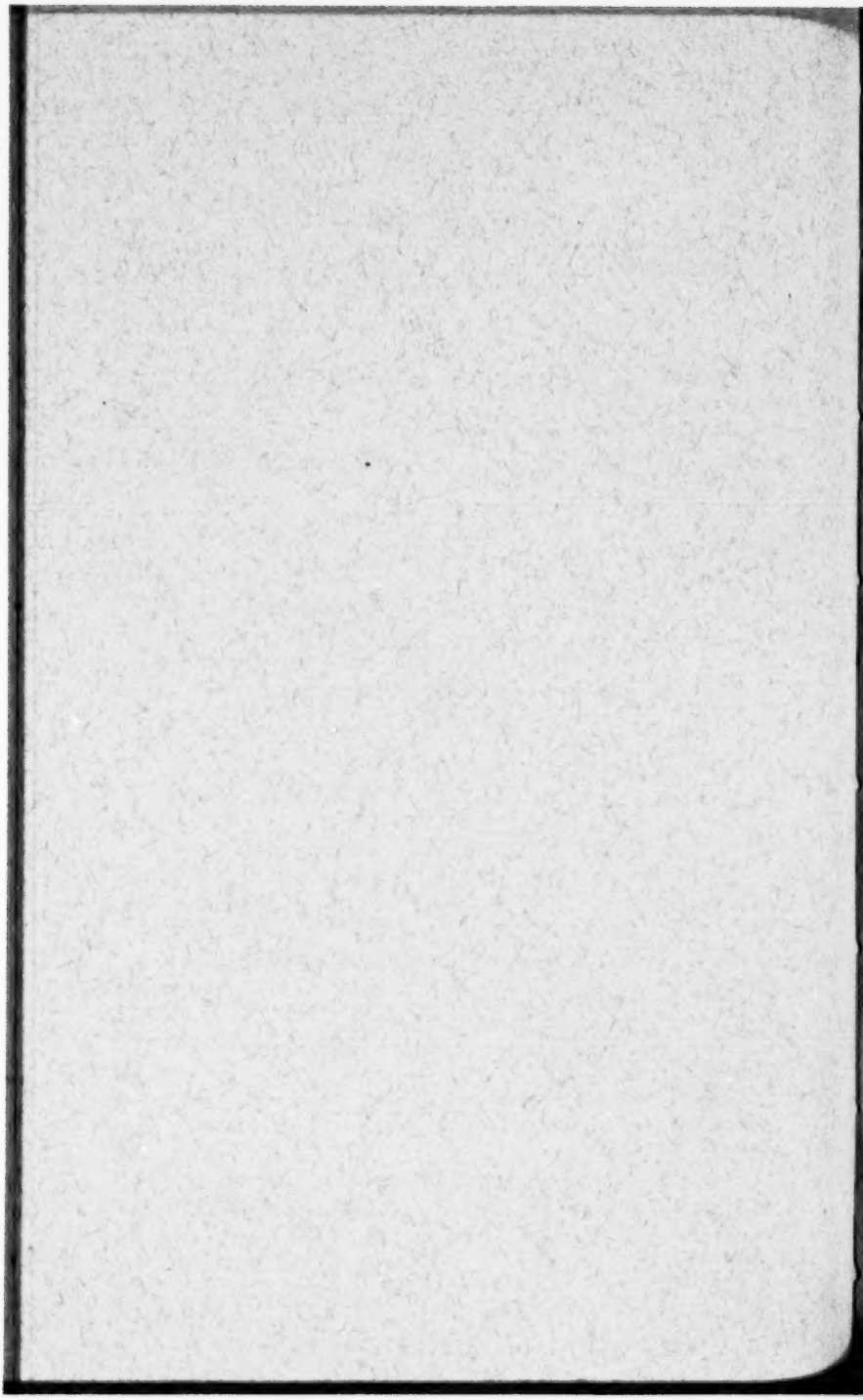
vs.

S. C. WHITE, A. J. REW, G. WALTER MAPP, EMMA P. PARSONS, C. B. ROSS, S. F. PARKS, AND J. BROOKS MAPP AND MARGARET BELL CHANDLER, ADMINISTRATORS OF THE ESTATE OF JOHN W. CHANDLER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FRANCIS C. BROWN,
JAMES M. KANE,
Attorneys for Petitioner.

JEFF F. WALTER,
TAZEWELL TAYLOR,
Of Counsel.



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S. C. WHITE, A. J. REW, G. WALTER MAPP, EMMA P. PARSONS, C. B. ROSS, S. F. PARKS, AND J. BROOKS MAPP AND MARGARET BELL CHANDLER, ADMINISTRATORS OF THE ESTATE OF JOHN W. CHANDLER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Federal Deposit Insurance Corporation, Receiver of the Parksley National Bank, Parksley, Virginia, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above case on September 10, 1941 (R. 246), and the order entered on December 18, 1941 (R. 257), denying the rehearing thereof.

Opinions Below.

The opinion of the Circuit Court of Appeals rendered September 10, 1941 (R. 236-245), affirming in part and reversing in part the judgment of the United States District Court for the Eastern District of Virginia, is reported at 122 F. (2d) 770. Petition for rehearing filed by appellee on October 7, 1941 (R. 246-254), was denied with per curiam opinion rendered December 18, 1941 (R. 256-257), reported at 124 F. (2d) 429.

Memorandum opinion of the United States District Court after trial on the merits is not reported but appears in the record at pages 158-161.

Jurisdiction.

The order of the Circuit Court of Appeals denying rehearing was filed December 18, 1941.

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Section 1 (U. S. C., Title 28, Sec. 347 (a)).

Summary Statement of Matters Involved.

Undisputed Facts.

For many years prior to 1933, the Parksley National Bank of Parksley, Virginia (hereinafter called the bank) a national banking association (R. 24) conducted a banking business in Parksley, Virginia (R. 35). The bank was among those not permitted to reopen at the termination of the banking holiday proclaimed by the President of the United States on March 6, 1933 [1] closing all banking institutions in the country (R. 7, 12, 18, 36). On May 10, 1933,

[1] Proclamation No. 2039 and Proclamation No. 2040 continuing the holiday, the text of both appearing in the notes following U. S. C. Title 12, Sec. 95.

the Comptroller of the Currency appointed S. C. White (who had been cashier and a director of the bank) (R. 51) conservator of the bank [2] (R. 36). While the bank was in conservatorship, the directors of the bank (who are the respondents here (R. 1, 6, 10, 16, 21) and who owned about 85% of the bank's stock (R. 141)) appointed three of their members as a committee (hereinafter called the reorganization committee) to conduct negotiations looking toward reopening the bank (R. 91). At the insistence of the reorganization committee (R. 168) a plan of reorganization was submitted to the Comptroller of the Currency, the terms and conditions of which contemplated inter alia that the shareholders would make "an unconditional voluntary contribution of $50,000" which would rehabilitate the bank's capital structure and enable it to "eliminate" assets classified as slow, doubtful or worthless, including approximately $62,000 face value of bills receivable and other miscellaneous assets (R. 167-169). This plan was approved by the Comptroller of the Currency (R. 169) on May 27, 1933.[3] (R. 167).

On July 15, 1933, Conservator White certified to the Comptroller of the Currency "that the sum of $50,000 has been voluntarily contributed for the rehabilitation of the capital structure" (R. 172A). In reliance thereon and effective July 19, 1933, the Comptroller of the Currency terminated the conservatorship of the bank [4] (R. 173-174) on which date White, in his capacity as conservator, returned to the board of directors of the bank all of the assets of the bank (R. 174A) including those to be "eliminated" (hereinafter called unacceptable assets) in accordance with

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[2] Pursuant to the provisions of Sec. 203 of the Act of Mar. 9, 1933, 48 Stat. 2, U. S. C. Title 12, Sec. 203.

[3] Pursuant to the provisions of Sec. 207 of the Act of Mar. 9, 1933, 48 Stat. 3, U. S. C. Title 12, Sec. 207, text at pp. 24-5, *infra*.

[4] Pursuant to the provisions of Sec. 205 of the Act of Mar. 9, 1933, 48 Stat. 3, U. S. C. Title 12, Sec. 205, text at pp. 23-4, *infra*.

the terms and conditions of the reorganization plan (R. 52), White resuming his functions as cashier and director (R. 36). The unacceptable assets were charged off on the books of the bank on July 19, 1933 (R. 52, 56), and thereafter collections from the unacceptable assets as well as recoveries on assets previously charged off on the books of the bank were credited by White to a checking account maintained in the bank's individual deposit ledger under the caption "S. C. White, Special D" (R. 61, 212). The collections thus credited totalling $13,132.17 (R. 72, 215-218) were disbursed by White for and to the use or benefit of the directors (R. 61, 78) who alone (rather than all shareholders) made the $50,000 voluntary cash contribution (R. 25).

During the period between the reopening of the bank in July 1933 and its suspension in May 1939, the bank submitted to the Comptroller of the Currency as required by statute [5] eleven reports of its earnings and dividends (Ptf's Exh. No. 8 (R. 50, 177-200)), all of which were attested to by Cashier White and each of which contained a $50,000 entry on line 24 described as "Voluntary contributions to surplus or profits".

Under date of April 28, 1936, Deputy Comptroller of the Currency Gough addressed a letter to the Board of Directors of the bank (Ptf's Exh. No. 10 R. 202-204) in which it was stated that the examiner who conducted an examination of the bank on March 4, 1936, had advised that certain shareholders who contributed $50,000 to rehabilitate the capital were taking the position that they purchased the unacceptable assets and that they should receive recoveries thereon, which position was contrary to the conditions imposed by the Comptroller of the Currency when he approved

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[5] R. S. 5212, U. S. C. Title 12, Sec. 163.

the plan of reorganization. Deputy Comptroller Gough further stated:

> "Therefore, no assets should have been transferred to or held in trust for these shareholders; and if such assets have been set aside, recovery on them should go to the bank." (R. 203)

Deputy Comptroller Gough's letter was received at the bank (R. 51, 81) but the criticism or admonition contained therein concerning the unacceptable assets was not heeded (R. 81-82).

The bank continued its operations until May 18, 1939 (R. 2, 6, 11, 16), when it was closed because of inability to meet the demands of its depositors and petitioner was appointed receiver [6] (R. 201).

When petitioner (by its liquidator) took charge of the affairs of the bank as receiver, most of the remaining unacceptable assets were found by petitioner's liquidator in a sealed envelope among the effects of the bank (R. 85).

Proceedings in and Rulings of Courts Below.

On January 11, 1940 (R. 1), petitioner [7] instituted this action against respondents [8] praying that (a) the Court determine by way of declaratory judgment the assets of the bank to which petitioner as receiver was entitled; (b) respondents be required to pay and deliver the said assets to petitioner together with any collections received thereon by the respondents or their agents, together with interest

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[6] Pursuant to the provisions of the Act of Aug. 23, 1935, Sec. 101, subsection (1) (3), 49 Stat. 694, U. S. C. Title 12, Sec. 264 (1) (3).

[7] Pursuant to its statutory duty as prescribed in subsection (1) (4) of Section 101 of the Act of Aug. 23, 1935, 49 Stat. 694, U. S. C. Title 12, Sec. 264 (1) (4) reading in part—"It shall be the duty of the Corporation as such receiver to realize upon the assets of such closed bank,—".

[8] As an action involving the winding up of the affairs of a National Banking Association as provided by Par. 15, Sec. 563 R. S. and Paragraphs 10 and 11 of Sec. 629 R. S. as amended by the Act of Mar. 3, 1911, 36 Stat. 1092, U. S. C. Title 28, Sec. 41 (16).

thereon; (c) respondents be permanently enjoined and restrained from disposing of or attempting to make collections on account of any of the assets of the bank; (d) respondents and each of them be required to account for all assets of the bank, together with payments received thereon by them or for their account, together with interest; (e) respondents be enjoined from taking any step or performing any act which would change the status of any of the assets of the bank (R. 4-5). The answers filed by the several respondents asserted that the real subject matter of the complaint was the title to the unacceptable assets (R. 7, 12, 18) and that according to the terms of an alleged agreement, contract or understanding had by the reorganization committee with representatives of the Comptroller of the Currency and/or the Federal Reserve Bank of Richmond and/or the Reconstruction Finance Corporation, the unacceptable or "eliminated" assets were to become the property of the persons making the $50,000 contribution toward the capital rehabilitation (R. 8-9, 13-14, 18-19, 21-22).

In a pretrial conference held on May 27, 1940, an order was entered (R. 23-25) providing that the only issue to be submitted to the jury would be the question of whether petitioner or respondents were entitled to the unacceptable assets and the collections thereon (R. 24-25).

Thereafter, and on the date the case was set for trial, and over objection by petitioner's counsel, the court permitted respondents to file separate amended answers (R. 33-34) in which each of them pleaded the Virginia 5-year general statute of limitations [9] as to $11,071.70 in collections made more than 5 years prior to the bringing of suit, or in the alternative the Virginia 3-year general statute of limitations [9] as to $11,851.52 in collections made more than 3 years prior to the bringing of suit (R. 26-31). Laches

[9] Sec. 5810 Code of Virginia, the text of which appears in the appendix, p. 23, *infra*.

was also set up by way of defense in the amended answers (R. 26-32). The Court, however, reserved decision upon the legal sufficiency of the pleas (R. 34) and petitioner's counsel then moved to strike the pleas (R. 34-35) the court also reserving decision on this motion (R. 35).

Petitioner rested its case in chief (R. 83) after proving the undisputed facts set out supra, pp. 2-5. Respondents then undertook to prove that the bank was reopened in July, 1933, pursuant to an agreement which contemplated that the unacceptable assets would become the property of those contributing to the capital rehabilitation (R. 92). On objection of petitioner's counsel to the introduction of this line of evidence (R. 92), the jury was retired from the courtroom (R. 93) whereupon respondents tendered evidence that the contributions to the capital rehabilitation were made by the respondents with the understanding that they would become the owners of the unacceptable assets (R. 93-97, 123, 124). All of the evidence so offered on objection of petitioner's counsel was rejected by the trial court as being in violation of the parol evidence rule, i.e. proffered for the purpose of varying the written official record of the Comptroller of the Currency with respect to the ownership of the assets (R. 121-122).

When the court indicated that it would enter a declaratory judgment to the effect that the unacceptable assets belonged to the bank, a short discussion ensued wherein the remaining issues, viz: applicability of the statute of limitations, as well as questions of agency and interest, were specified (R. 130).

After the jury returned to the courtroom, the only witness placed on the stand by respondents was S. C. White (R. 132) (former director-cashier-conservator), who testified that there were about 15 non-director shareholders of the bank owning approximately 15% of the capital stock (R. 141), all of whom were aware that the directors "had

bought these charged-off assets in July, 1933"(R. 138), and that

> "• • • We had from two to three examinations each year from 1933 until the bank closed, and part of that time the chief National Bank Examiner put us on a list of special examinations. There was no criticism ever stated in there. I am speaking of the reports by the Examiner. There wasn't anything, whatsoever, regarding the charged-off items of 1933" (R. 136).

None of the evidence previously offered by respondents and rejected by the court was retendered.

Motions for directed verdict were made on behalf both of respondents (R. 151) and of petitioner (R. 152). The court held as a matter of law that the unacceptable assets at all times remained the property of the bank and directed the jury to return a verdict in favor of the plaintiff for the aggregate of the sums shown by the evidence to have been realized by respondents from the assets since July, 1933, less proper credits, plus interest, and to close the verdict with the clause "Subject to the Court's later determination on the pleas of the statute of limitation" (R. 154).

The jury returned a verdict for petitioner in the sum of $13,132.17 with interest, with the above quoted qualifying clause as directed by the Court (R. 156-157), whereupon respondents filed motions to set aside the verdict or to grant a new trial (R. 157-158).

Later, the Court overruled respondents' motion for new trial (R. 164) and rejected respondents' several pleas of the statutes of limitations and laches (R. 164). In its memorandum opinion, the trial court not only held, as a matter of law, that a court of equity should not

> "Under the circumstances—permit defendants to plead the statute of limitations or laches in • • • an equity action against them for an accounting • • •" (R. 160).

but also in effect found as a fact that there was

> "* * * a lack of evidence showing unequivocal action on their part that was open, hostile and adverse to continued ownership by the bank of the assets in controversy" (R. 159).

Respondents appealed (R. 165) and the Court of Appeals affirmed the decision of the trial court insofar as it held that the bank retained title to and ownership of the unacceptable assets (R. 239-240), but then reversed the decision and judgment of trial court by holding that the Virginia statute of limitations was applicable and barred petitioner's right of action (except as to one item of recovery, viz: $1,009.33) because

> "there was knowledge on the part of all the stockholders, * * * any of whom could have brought suit on behalf of the bank" (R. 242)

and

> "there was actual knowledge also, on the part of the bank examiners representing the Comptroller of the Currency" (R. 242) "* * * who had 'ample power to compel restitution, resignation, or a receivership'" (R. 243) * * * "and the Federal Deposit Insurance Corporation (*which*) was given ample power to protect itself and the public" (R. 242). (Italics supplied.)

Petitioner filed a petition for rehearing, or in the alternative, for modification of the opinion of the Court of Appeals or for remand of the cause for a partial new trial (R. 246-254), asserting as grounds therefor inter alia that the case was tried and treated not only by the parties but also by the trial court as one presenting an issue of law with respect to the applicability of the statute of limitations to this case, rather than an issue of fact, and that the court decided important questions of law concerning remedies or sanctions available to federal bank supervising agencies probably in conflict with Federal Banking Laws.

The appellate court denied the petition for rehearing but modified its former judgment by directing the trial court to determine the applicability of the statute of limitations to certain collections which petitioner asserted are in the same category as the aforesaid excepted $1,009.33 item (R. 256-257).

Statutes Involved.

Section 5810 Virginia Code of 1936—Limitation of personal actions generally, quoted in Appendix infra, p. 23.

Section 205 of the Emergency Banking Act (Act of March 9, 1933), 48 Stat. 3, U. S. C. Title 12, Section 205, quoted in the Appendix infra, pp. 23-24.

Section 207 of the Emergency Banking Act (Act of March 9, 1933), 48 Stat. 3, U. S. C. Title 12, Section 207, quoted in the Appendix infra, pp. 24-25.

Subsection (1) (4) of Section 101 of the Act of August 23, 1935, 49 Stat. 694, U. S. C. Title 12, Section 264 (1) (4), a pertinent portion of which is quoted in footnote 14, p. 15 infra.

R. S. 5239 as amended by the Act of March 3, 1911, 36 Stat. 1167, U. S. C. Title 12, Section 93, quoted in full in Appendix infra, p. 25.

R. S. 5240 as amended by the Acts of February 19, 1875, 18 Stat. 329, and December 23, 1913, 38 Stat. 271, U. S. C. Title 12, Section 484, quoted in full in footnote 16, p. 17 infra.

Section 30 of the Act of June 16, 1933, 48 Stat. 193 U. S. C. Title 12, Section 77, quoted in full in Appendix infra, pp. 26-27.

Subsection (i) (1) of Section 101 of the Banking Act of 1935 (Act of August 23, 1935), 49 Stat. 690, 691, U. S. C. Title 12, Section 264 (i) (1), quoted in full in Appendix infra, pp. 27-28.

Specification of Errors to be Urged.

The Circuit Court of Appeals for the Fourth Circuit erred:

(1) In failing to hold that respondents are estopped as a matter of federal public policy to plead statutes of limitations or laches;

(2) In holding and deciding that knowledge acquired by federal bank examiners which is not communicated to their superiors is nevertheless imputed to the Comptroller of the Currency and to the Federal Deposit Insurance Corporation so as to set in motion the statute of limitations of the State against an insured national bank or its statutory receiver and in favor of offending directors;

(3) In holding and deciding that the Comptroller of the Currency had the power to compel respondents to restore the unacceptable assets and that the failure of the Comptroller to compel respondents to resign or to place the bank in receivership within the period prescribed by the statute of limitations of the State barred this action by the statutory receiver of the bank;

(4) In holding and deciding that the Federal Deposit Insurance Corporation had ample power to protect itself and the public and that its failure to exercise this power within the period prescribed by the statute of limitations of the State barred this action by the statutory receiver of the bank;

(5) In holding and deciding that knowledge acquired by non-director shareholders of the bank (who, together with respondents were to contribute to the bank's capital rehabilitation under the reopening requirement laid down by the Comptroller that there be an "unconditional voluntary

cash contribution by shareholders") was imputable to the bank where it was to the interest of the independent non-contributing shareholders to permit respondents to appropriate the unacceptable assets rather than to bear their proportion of the contributions;

(6) In reversing the judgment of the District Court and rendering judgment for respondents on the ground that issues of fact are determinative of the case where the District Court and the parties tried the case as one presenting an issue of law (i. e., whether respondents are estopped to plead statutes of limitations or laches);

(7) In failing to remand the case for new trial so that the issues of fact considered by the Court of Appeals to be determinative of the case could be resolved on full opportunity to all parties to examine and produce competent evidence;

(8) In finding facts considered to be determinative of the case from incomplete, hearsay and excluded evidence;

(9) In assuming in the absence of proof that the Comptroller of the Currency and the Federal Deposit Insurance Corporation did not perform their duties;

(10) In not confining its judgment to items encompassed in respondents' pleas, viz.: Collections made more than 5 years prior to the bringing of this suit;

(11) In not accepting the trial court's finding that respondents' possession of the unacceptable assets was not open, hostile and adverse to the bank;

(12) In not holding and deciding that respondents had the burden of proving facts necessary to sustain the affirmative defenses of statute of limitations and laches and that respondents did not meet that burden;

Questions Presented and Reasons for Allowance of Writ of Certiorari

The Circuit Court of Appeals, in reversing the decision of the District Court, has decided (erroneously, we believe) several important questions, which will be stated in and discussed under the following sub-headings:

1. *If directors of a national bank, without warrant or authority, appropriate assets of the bank to their own use and benefit and remain in control of the bank's affairs until it suspends, are they estopped to plead statutes of limitations or laches in an action brought against them by the Federal Deposit Insurance Corporation as statutory receiver of the bank for the purpose of determining the ownership of the converted assets and for an accounting?*

In reversing the District Court and deciding that respondents are entitled to "the benefit of the defenses of laches and of the statute of limitations" the Court of Appeals decided an important question involving the power of Federal courts to exercise their discretion in determining whether the application of the statute of limitations of the forum to a cause of action created by the Federal law [10] is in contravention of the public policy underlying that Federal law. This precise, important and far-reaching Federal question has not been [11] but should be determined by this Court.

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[10] R. S. 5239, as amended by the Act of Mar. 3, 1911, 36 Stat. 1167, U. S. C. Title 12, Sec. 93, text appearing in appendix, p. 25, *infra*.

[11] In *Curtis* v. *Connly* (1921), 257 U. S. 260, there was no dispute as to the applicability of the local statute of limitations, the only issue being when the statute was set in motion, and in *Campbell* v. *City of Haverhill* (1895), 155 U. S. 610 there was no contention that the policy underlying the creation of the federal right was repugnant to the purpose of the statute of limitations.

The decision below seems to conflict with applicable principles recently established by this Court. *Deitrick* v. *Greaney* (1940), 309 U. S. 190, held that in an equity suit brought by the receiver of a national bank to enforce payment of a promissory note, Federal public policy underlying the national bank act would not permit the defendant (a director of the bank) to defeat the purpose of the national bank act by pleading his own violation thereof even though the substantive defense (want of consideration) was cognizable generally under State law and by Federal courts.[12] *D'Oench Duhme, Inc.* v. *Federal Deposit Insurance Corporation,* No. 206, decided March 2, 1942, denied to the defendant (who was not a director) the right asserted to plead defenses generally available (*i. e.,* accommodation and want of consideration) as against the Federal Deposit Insurance Corporation (petitioner here) and the public funds which it administers because the act sought to be relied upon contravened the Federal policy and said "it is the 'evil tendency' of the acts to contravene the policy governing banking transactions which lies at the root of the rule." Since substantive defenses which are considered to be available generally in commercial transactions cannot be successfully invoked where they contravene a well defined Federal policy *a fortiori,* bank directors should not be permitted to plead failure or refusal to perform their duties within the period prescribed by local statutes of limitations which ordinarily are treated as matters of procedure, varying in every jurisdiction, particularly when to so do would defeat rights created by the Federal law and vitally connected with the public interest.

The decision below is in substantial conflict with the decision of the Circuit Court of Appeals for the Ninth

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[12] The Circuit Court of Appeals for the Sixth Circuit followed and extended the rule of the Greaney case to a non-director obligor in *Federal Deposit Insurance Corporation, Receiver* v. *Vest* (1941), 122 F. (2d) 765, Certiorari Denied, 314 U. S. —, No. 748.

Circuit in *Adams, et al.* v. *Clarke* (1927), 22 F. (2d) 957, (also an equity case and presenting facts almost identical with those here involved), wherein it was held that even though the illegal transactions there complained of were disclosed on the books of the bank,[13] nevertheless the defendant directors who (as here) not only held a majority of the capital stock but continued in control of the bank's affairs, would not be permitted to take advantage of inaction for which they alone were responsible.

The Court of Appeals has decided important questions, probably in conflict with rules laid down by this Court, involving the applicability of State statutes of limitation to actions brought by a Federal instrumentality to remove unlawful obstacles to the fulfillment of its statutory duties [14] and to enforce rights beneficially owned not only by the instrumentality itself [15] but also by the depositing public which Congress has sought to protect and safeguard in a separate banking code. These aspects of the decision below seem to conflict with the well-settled principles consistently applied by this Court, viz:

> "state notions of laches and state statutes of limitations have no application to suits by the Government, whether on behalf of Indians or otherwise".

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[13] And therefore presumably known to national bank examiners.

[14] Subsection (1) (4) of Sec. 101 of the Act of Aug. 23, 1935, 49 Stat. 694, U. S. C. Title 12, Sec. 264 (1) (4) reading in part—"It shall be the duty of the Corporation as such receiver to realize upon the assets of such closed bank, having due regard to the condition of credit in the locality; to enforce the individual liability of the stockholders and directors thereof; * * *"

[15] Pursuant to the requirements of subsection (d) of Sec. 101 of the Act of Aug. 23, 1935, 49 Stat. 686-687, U. S. C. Title 12, Sec. 264 (d), the capital stock of the Federal Deposit Insurance Corporation is owned and held as follows: United States $150,000,000.00 and Federal Reserve Banks $139,299,556.99—see 1940 Annual Report of Federal Deposit Insurance Corporation, p. 31. When the subject bank closed it had total deposit liabilities of $181,551 of which $176,631 were insured by the Federal Deposit Insurance Corporation. See 1939 Annual Report of Federal Deposit Insurance Corporation, p. 224.

Jackson County v. *United States* (1939), 308 U. S. 343, 351, and

> "when the United States becomes entitled to a claim, acting in its governmental capacity and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement."

United States v. *Summerlin* (1940), 310 U. S. 414, 417, citing *Chesapeake and D Canal Co.* v. *United States* (1919), 250 U. S. 123, 126.

The creation by the government of a corporate instrumentality to perform governmental functions does not remove from those activities immunities which would have attached if the functions were performed by the government through one of its departments. *Pittman* v. *Home Owners' Loan Corp.* (1939), 308 U. S. 21, 32.

2. *Assuming that the Comptroller of the Currency and the Federal Deposit Insurance Corporation learn that directors of an insured national bank are converting its charged-off assets to their own use, do these supervising authorities have power under the law to institute suit or take other action to remedy the situation?*

The decision of the Court of Appeals on this important and far reaching question dealing with remedies and sanctions available to federal bank supervising authorities as against offending directors has not been but should be settled by this Court. If, as the language of its opinion indicates, the court below meant that the Comptroller could have brought suit against respondents or otherwise "to compel restitution" of the charged-off assets or their avails, then such holding would seem to be in direct contravention of

U. S. C. Title 12, Sec. 484,[16] which for the purposes here involved limits visitorial powers [17] to those authorized by law. Diligent search fails to reveal any statute authorizing the Comptroller to bring action on behalf of an operating bank to recover on or restore assets, or otherwise enforce rights accruing to the bank or any decided case where the Comptroller has undertaken on behalf of an operating bank to enforce the bank's rights or causes of action whether against directors or others.

If the Comptroller has the implied, inherent, or common-law power to bring such a suit, then he may have a correlative duty, burdensome and difficult of administration though it might be. Petitioner understands that the Comptroller has never undertaken to enforce by suit, rights or causes of action on behalf of banks.

Again, if the vesting in the Comptroller of such drastic powers as to

(a) place a national bank in receivership for violations of law [18]

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[16] R. S. 5240 as amended by the Acts of February 19, 1875, 18 Stat. 329 and December 23, 1913, 38 Stat. 271, U. S. C. Title 12, Sec. 484, reading—"No bank shall be subject to any visitorial powers other than such as are authorized by law, or visited in the courts of justice or such shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or either House duly authorized." See *Brinkerhoff* v. *Bostwick*, 88 N. Y. 52, 57, reversing 23 Hun. 237, error dismissed 106 U. S. 3, holding that only provision which authorizes Comptroller to institute any action in relation to the affairs of an operating national bank is Sec. 5239 R. S. (U. S. C. Title 12, Sec. 93).

[17] Visitorial power has been defined to mean "the power to control and arrest abuses, and to enforce a due observance of the statutes." *State* v. *First National Bank* (1912), 61 Or. 551, 123 P. 712.

[18] for failure to fully pay up or restore impairment in capital stock, U. S. C., Title 12, Sec. 55; for failure to correct unlawful number of directors, U. S. C., Title 12, Sec. 71 (a); for failure within six months to dispose of its own stock illegally acquired, U. S. C., Title 12, Sec. 83; for failure to pay a judgment against it within thirty days of rendition, U. S. C., Title 12, Sec. 191; upon termination of status as an insured bank, U. S. C., Title 12, Sec. 264 (i) (2); for false certification of checks, U. S. C., Title 12, Sec. 501, 591.

(b) remove directors or officers for continued unsafe and unsound practices or violations of law [19]
or

(c) publish reports of examination [20]

which were obviously designed to cause a cessation of continued bad practices or violations of law, are to be treated or considered, for the purposes of applying the statute of limitations, the same as common-law or statutory remedies prescribed as the instruments by which rights as between private parties could be protected or enforced, then the invocation of the above-described statutory sanctions or remedies or any of them, in most instances, would ruin or close rather than benefit the bank and still would not restore to the bank the losses suffered by reason of the wrongs previously committed or rights previously violated.

It is assumed that the Court had reference to par. 1 of subsection (i) of the Federal Deposit Insurance Corporation Law [21] when it said—

> "The Federal Deposit Insurance Corporation was given ample power to protect itself and the public".

Sanctions made available to bank supervising authorities for correcting abuses and preserving solvency should not be treated as remedies so that the failure of the supervising authorities (either because of lack of knowledge of the facts or for other reasons satisfactory to the authorities in the

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[19] Sec. 30 of the Act of June 16, 1933, 48 Stat. 193, as amended by Sec. 203 (a) of the Act of Aug. 23, 1935, 49 Stat. 704, U. S. C. Title 12, Sec. 77, text appearing in appendix, p. 26, *infra*.

[20] Sec. 28 (a) of the Act of June 16, 1933, 48 Stat. 192, amending Sec. 5240 R. S., U. S. C. Title 12, Sec. 481.

[21] Subsection (i) (1) of Sec. 101 of the Act of Aug. 23, 1935, 49 Stat. 690-691, U. S. C. Title 12, Sec. 264 (i) (1), text appearing in appendix, pp. 27-28, *infra*.

exercise of the broad discretion vested in them) would deprive either the bank itself or its creditors of a right conferred upon them by the Federal Banking Law.

3. *Is the Comptroller of the Currency or the Federal Deposit Insurance Corporation chargeable as a matter of law with knowledge acquired by their respective bank examiners, which knowledge is not in fact communicated to the supervising officer or agency?*

When the observation of the Court below that—"The national bank examiners reported to the Comptroller of the Currency, * * * "is read in the light of the only evidence on the subject, namely: former cashier White's testimony,[22] and in the light of the remainder of the decision it is apparent that the Court below concluded that knowledge allegedly coming to the attention of the examiners prior to the examination of the bank in March 1936,[23] was imputed as a matter of law (rather than communicated in fact) to the Comptroller of the Currency or the Federal Deposit Insurance Corporation or both. The decision on this point is in substantial conflict with the decision of the Court of Appeals for the Ninth Circuit in *United States* v. *Burleigh* (1940), 110 F. (2d) 793, 796.

As pointed out supra, page 18, the statutory remedies or sanctions which are made available to the bank supervising authorities are drastic in their nature and certainly require the exercise of the most prudent and careful discretion before any of them are invoked. To say that knowledge acquired by an examiner (and petitioner does not concede that such knowledge was acquired prior to 1936) but not actually communicated to his superior (whether

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[22] Quoted *supra*, p. 8.

[23] Being the examination referred to in Deputy Comptroller Gough's letter dated April 28, 1936 (R. 202-204) which was within 5 years prior to bringing this suit.

through improper motives, forgetfulness or otherwise) is nevertheless imputable to the superior is tantamount to holding that the Comptroller of the Currency himself and the Board of Directors of the Federal Deposit Insurance Corporation (not the examiners because they have no such powers) have the duty on behalf of banks, creditors and others effected to invoke these drastic measures when they know nothing whatever of the facts.

4. *If the trial court, deciding that an issue of law is determinative of a case, excludes evidence which deals only incidentally with that phase of the case and makes no findings, should the Court of Appeals, which concludes that the case turns on an issue of fact, make its own findings and reverse with directions to enter judgment for appellant, or should it order a new trial so that the issue may be resolved after full opportunity afforded to both parties to introduce competent evidence?*

In reversing the judgment of the trial court with directions to enter judgment for respondents (except as to collections from assets other than the unacceptable assets which were charged off on July 19, 1933), the Court of Appeals decided an important question of appellate court procedure, in conflict with applicable decisions of other circuits and of this Court.

The Court of Appeals for the Third Circuit in *Lehigh Coal & Navigation Co.* v. *United States*, (1920) 266 F. 457, (conforming to answer by this Court to certified question, *Lehigh Coal & Navigation Co.* v. *United States* (1919), 250 U. S. 556), refused to decide an issue of fact on evidence excluded by the trial court despite contentions by both parties (as here) "that the case should not, for exactly opposite reasons, be returned to the District Court for another trial, but could and should be finally disposed of by this

Court." In *Bradley* v. *Hargadine-McKittrick Dry-Goods Co.* (1899), 96 F. 914, the Court of Appeals for the Eighth Circuit held that it was error for an appellate court on reversal to render judgment (based on an issue of fact) for the party who was unsuccessful below where no such issue was submitted at the trial. The Court of Appeals for the Ninth Circuit in *Indemnity Ins. Co. of North America* v. *Levering* (1932), 59 F. (2d) 719 held that it was powerless to order judgment entered in a law action where there are fact issues for a jury or upon stipulation to be determined by the court. The Court of Appeals for the Fifth Circuit in *City of El Paso* v. *West* (1939), 102 F. (2d) 927, reh. den. 104 F. (2d) 96, cer. den. 308 U. S. 587 held that where "there is no evidence especially concerning" the determinative issue of fact and the judgment below was erroneously founded upon issues of law, the appellate court is not in a position to render a different judgment but must order a new trial.

Clarence A. Stewart, Adm. of the Estate of John R. Stewart, Deceased v. *Southern Railway Co.*, No. 161, decided by this Court February 16, 1942, held that since the evidence introduced at the trial was incomplete, and an issue of fact might have been determinative of the case, the Court of Appeals, on re-hearing, should have ordered a new trial rather than directing judgment for the appellant.

Conclusion.

The decision below is in substantial conflict with decisions of other United States Circuit Courts of Appeal, and of this Court. The questions involved are of substantial importance in the field of Federal bank supervision and liquidation as well as of appellate court procedure which call for authoritative rulings by this Court. Therefore it is re-

spectfully submitted that this petition for a writ of certiorari be granted.

FRANCIS C. BROWN,
Solicitor, Federal Deposit Insurance Corporation,
JAMES M. KANE,
Counsel, Federal Deposit Insurance Corporation,
Attorneys for Petitioner.

JEFF F. WALTER,
Onley, Virginia.
TAZEWELL TAYLOR,
Citizens Bank Bldg.,
Norfolk, Virginia,
Of Counsel.

APPENDIX.

Statutes Involved.

Section 5810, Virginia Code.

"Every action to recover money which is founded upon an award, or on any contract, other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say: If the case be upon any contract by writing under seal, whether made by a public officer, a fiduciary or private person within ten years; if it be upon an award or upon a contract in writing signed by the party to be charged thereby, or by his agent, but not under seal, within five years; and if it be upon any other contract express or implied within three years, unless it be an action by one partner against his co-partner for a settlement of the partnership account, or upon accounts concerning the trade of merchandise between merchant and merchant, their factors, or servants, in either of which cases the action may be brought until the expiration of five years from the cessation of the dealings in which they are interested together, but not after; provided that the right of action against the estate of any person hereafter dying, or upon any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued; and provided further that the limitation to an action or other proceeding for money on deposit with a bank or any person or corporation doing a banking business shall not begin to run until a request in writing be made, therefor by check, order, or otherwise."

Section 205 of the Emergency Banking Act (Act of March 9, 1933), 48 Stat. 3, U. S. C. Title 12, Section 205.

If the Comptroller of the Currency becomes satisfied that it may safely be done and that it would be in the public in-

terest, he may, in his discretion, terminate the conservatorship and permit such bank to resume the transaction of its business subject to such terms, conditions, restrictions and limitations as he may prescribe.

Section 207 of the Emergency Banking Act (Act of March 9, 1933), 48 Stat. 3, U. S. C. Title 12, Section 207.

In any reorganization of any bank under a plan of a kind which, under existing law, requires the consent, as the case may be, (a) of depositors and other creditors or (b) of stockholders or (c) of both depositors and other creditors and stockholders, such reorganization shall become effective only (1) when the Comptroller of the Currency shall be satisfied that the plan of reorganization is fair and equitable as to all depositors, other creditors, and stockholders and is in the public interest and shall have approved the plan subject to such conditions, restrictions, and limitations as he may prescribe and (2) when, after reasonable notice of such reorganization, as the case may require, (A) depositors and other creditors of such bank representing at least 75 per cent in amount of its total deposits and other liabilities as shown by the books of the bank or (B) stockholders owning at least two-thirds of its outstanding capital stock as shown by the books of the bank or (C) both depositors and other creditors representing at least 75 per cent in amount of the total deposits and other liabilities and stockholders owning at least two-thirds of its outstanding capital stock as shown by the books of the bank, shall have consented in writing to the plan of reorganization: *Provided, however,* That claims of depositors or other creditors which will be satisfied in full under the provisions of the plan of reorganization shall not be included among the total deposits and other liabilities of the bank in determining the 75 per cent thereof as above provided. When such reorganization becomes effective, all books, records, and assets of the bank shall be disposed of in accordance with the provisions of the plan and the affairs of the bank shall be conducted by its board of directors in the manner provided by the plan and under the conditions, restrictions and limitations which may

have been prescribed by the Comptroller of the Currency. In any reorganization which shall have been approved and shall have become effective as provided herein, all depositors and other creditors and stockholders of such bank, whether or not they shall have consented to such plan of reorganization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization.

R. S. 5239 as amended by the Act of March 3, 1911, 36 Stat. 1167, U. S. C. Title 12, Section 93.

If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district, or Territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

Section 30 of the Act of June 16, 1933, 48 Stat. 193, U. S. C. Title 12, Section 77.

Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by

the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board of Governors of the Federal Reserve System may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: *Provided,* That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or both, in the discretion of the court.

Subsection (i) (1) of Section 101 of the Banking Act of 1935, (Act of August 23, 1935), 49 Stat. 690, 1, U. S. C., Title 12, Section 264 (i) (1).

Any insured bank (except a national member bank or State member bank) may, upon not less than ninety days'

written notice to the Corporation, and to the Reconstruction Finance Corporation if it owns or holds as pledgee any preferred stock, capital notes, or debentures of such bank, terminate its status as an insured bank. Whenever the board of directors shall find that an insured bank or its directors or trustees have continued unsafe or unsound practices in conducting the business of such bank, or have knowingly or negligently permitted any of its officers or agents to violate any provision of any law or regulation to which the insured bank is subject, the board of directors shall first give to the Comptroller of the Currency in the case of a national bank or a District bank, to the authority having supervision of the bank in the case of a State bank, or to the Board of Governors of the Federal Reserve System in the case of a State member bank, a statement with respect to such practices or violations for the purpose of securing the correction thereof. Unless such correction shall be made within one hundred and twenty days or such shorter period of time as the Comptroller of the Currency, the State authority, or Board of Governors of the Federal Reserve System, as the case may be, shall require, the board of directors, if it shall determine to proceed further, shall give to the bank not less than thirty days' written notice of intention to terminate the status of the bank as an insured bank, and shall fix a time and place for a hearing before the board of directors or before a person designated by it to conduct such hearing, at which evidence may be produced, and upon such evidence the board of directors shall make written findings which shall be conclusive. Unless the bank shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured bank. If the board of directors shall find that any violation specified in such notice has been established, the board of directors may order that the insured status of the bank be terminated on a date subsequent to such finding and to the expiration of the time specified in such notice of intention. The Corporation may publish notice of such termination and the

bank shall give notice of such termination to each of its depositors at his last address of record on the books of the bank, in such manner and at such time as the board of directors may find to be necessary and may order for the protection of depositors. After the termination of the insured status of any bank under the provisions of this paragraph, the insured deposits of each depositor in the bank on the date of such termination, less all subsequent withdrawals from any deposits of such depositor, shall continue for a period of two years to be insured, and the bank shall continue to pay to the Corporation assessments as in the case of an insured bank during such period. No additions to any such deposits and no new deposits in such bank made after the date of such termination shall be insured by the Corporation, and the bank shall not advertise or hold itself out as having insured deposits unless in the same connection it shall also state with equal prominence that such additions to deposits and new deposits made after such date are not so insured. Such bank shall, in all other respects, be subject to the duties and obligations of an insured bank for the period of two years from the date of such termination, and in the event that such bank shall be closed on account of inability to meet the demands of its depositors within such period of two years, the Corporation shall have the same powers and rights with respect to such bank as in case of an insured bank.